UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

WYMAN GORDON PENNSYLVANIA LLC

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

Cases 04-CA-182126
04-CA-186281
04-CA-188990

CHARGING PARTY'S BRIEF IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION AND RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

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The Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union" or "Charging Party"), submits this brief in support of its Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge ("Cross-Exceptions") in accordance with Section 102.46(e) of the National Labor Relation Board's ("NLRB" or "Board") Rules and Regulations.

I. INTRODUCTION

Administrative Law Judge Arthur Amchan correctly concluded that Respondent Wyman Gordon Pennsylvania LLC ("Company" or "Respondent") unlawfully withdrew recognition of Charging Party, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union" or "Charging Party"), on November 29, 2016. He specifically determined that the Company's withdrawal of recognition was unlawful for four separate reasons: (1) the Company did not rely upon objective evidence establishing loss of majority support when it withdrew recognition based upon blank sheets of paper bearing employees' signatures; (2) the Company did not rely upon objective evidence establishing loss of majority support when it withdrew recognition because the Company did not authenticate the signatures of alleged petition signatories; (3) the Company did not demonstrate that the Union had lost majority support at the time of the Company's withdrawal of recognition; and (4) the Company's ongoing refusal to negotiate on vital mandatory subjects, including wages, benefits, and hours of work, tainted any showing of loss of support for the Union. Each of these bases is enough on its own to render unlawful the Company's withdrawal of recognition of the Union.

The Charging Party does not except to Judge Amchan's determinations that the Respondent unlawfully withdrew recognition for the reasons in his decision. The Union cross-excepts primarily to the judge's failure to find that Respondent's other unfair labor practices also tainted any showing of loss of support for the Union and to the judge's failure to adequately remedy the Respondent's unfair labor practices.

II. STATEMENT OF THE CASE

The Union won an election to represent employees at a Plains, Pennsylvania, manufacturing facility operated by the Company in May 2014. The Board certified the Union as the representative of production and maintenance employees on April 14, 2015. *Wyman Gordon Pennsylvania, LLC*, Case 04-RC-126196, unpub. Board order issued April 14, 2015 (2015 WL 1697071).

The Company and the Union thereafter began to negotiate a collective-bargaining agreement, holding their first bargaining session on September 17, 2015. (ALJD 2).[1] At that first meeting, the Union made a comprehensive proposal for a new agreement. (ALJD 14). The parties continued to meet through 2015 and 2016, although relatively little progress was made toward an agreement. (ALJD 2, 14-15).

The Company gave uniform increases in the hourly rate of pay for all unit employees every year on or about August 1. These varied somewhat in amount from year to year, but the typical range was $0.40 to $0.70 per hour. (ALJD 12). Notwithstanding this established practice, the Respondent did not give employees the annual raise on about August 1, 2016. (ALJD 12). Neither did Respondent inform the Union that it would withhold the annual raises.

[1] Citations to the ALJ's Decision and Recommended Order appear as "ALJD" followed by the relevant page numbers.

(ALJD 13). Instead, employees learned that they had not received the annual increases when they received their paychecks and did not see an increase. (ALJD 12).

On October 14, 2016, the Company suspended its established practice of providing light duty work to injured employees. (ALJD 13). Without notifying the Union in advance, Company officials called the five affected employees, including the Union's President, Brian Collura ("Collura"), to inform them not to report to work. (ALJD 13). The Respondent returned the employees to work on October 19, after the Union filed an unfair labor practice charge on October 17. (ALJD 13). Although the Company paid some compensation to the light duty employees for the days they were off of work, Judge Amchan specifically found that it was possible that not all of the employees had been fully compensated. (ALJD 13).

Throughout the bargaining, the Company insisted that it would not bargain about subjects it deemed economic until all non-economic matters were resolved, despite the Union's demands to discuss its economic proposals. (ALJD 13-14). The Respondent also failed to respond to numerous proposals made in the Union's comprehensive proposal presented at the first bargaining session. (ALJD 14). Despite the Union's repeated requests for responses to its proposals, the Company never responded to the Union's proposals on mandatory subjects including reporting pay, call-in pay, insurance benefits and employee contributions during the contract term, hours, vacation, holidays, wage increases during the term of the contract, new classifications and rates, and the 401(k) plan. (ALJD 14-15). The Company's refusal to engage on economic topics and to respond to the Union's proposals meant that bargaining made little progress.

The National Right to Work Legal Defense Foundation wrote an email to the Respondent's counsel on November 23, 2016, demanding that the Respondent withdraw

recognition from the Union. (ALJD 3). Attached to the email was a five-page document that lacked page numbers. (ALJD 3). The first and fifth pages of the document indicated that the undersigned employees did not wish to be represented by the Union. (ALJD 3). A total of nine signatures appeared on these two pages. (ALJD 3). The second, third, and fourth pages of the document were blank pages with signature lines. (ALJD 3). The second page bore nine signatures; the third contained four signatures; and the fourth had only one. (ALJD 3). The Company made no inquiry into why pages two, three, and four contained nothing but signature lines and signatures.[2] (ALJD 3). At this time, forty-three individuals were employed in the bargaining unit. (ALJD 3). Relying solely on the five pages sent by the National Right to Work Legal Defense Foundation, the Company notified the Union on November 29, 2016, that it would no longer recognize the Union as the representative of employees. (ALJD 4 & n.6).

The Union filed a number of charges alleging that the Respondent violated the Act. The General Counsel ultimately issued a complaint alleging that the Respondent had committed numerous violations of the law. Judge Amchan presided over a hearing in Philadelphia, Pennsylvania on March 19-20 and April 23-25, 2018. Judge Amchan issued his Decision and Recommended Order ("ALJD") on July 13, 2018.

The judge correctly determined that the Respondent violated the Act in many respects, including by maintaining an unlawful confidentiality policy (ALJD 9-10); by unilaterally withholding employees' annual raises in August 2016 without advance notice to the Union (ALJD 12-13); by unilaterally ceasing its practice of providing injured employees with light duty work on October 14, 2016, without advance notice to the Union (ALJD 13); by refusing to

[2] Nor did the Company appropriately verify the authenticity of the purported signatures. Judge Amchan specifically discredited Tim Brink's testimony that he verified all of the purported signatures. (ALJD 3-4).

negotiate with the Union over mandatory subjects the Company deemed economic until the parties had reached agreement on all matters it deemed noneconomic (ALJD 13-14); by refusing to respond in collective bargaining to many of the Union's proposals regarding mandatory subjects (ALJD 14-15); and by refusing to provide various information requested by the Union relevant to the parties' collective bargaining (ALJD 15-17). Most important, the judge held that the Company unlawfully withdrew recognition from the Union on November 29, 2016. (ALJD 4-9, 15).

Judge Amchan based his conclusion that the Respondent's withdrawal of recognition was unlawful upon several grounds:

1) The Respondent withdrew recognition of the Union based upon blank pieces of paper containing only signatures and signature lines (ALJD 4, 8-9 & n.12);
2) The Company failed to demonstrate the Union lacked the support of a majority of the bargaining unit on November 29, 2016 (ALJD 4-9);
3) The Respondent failed to authenticate enough signatures on the purported decertification petition to show that the Union had in fact lost majority support as of November 29, 2016 (ALJD 3-4 & n.5, 7 & n.10); and
4) The Company could not lawfully withdraw recognition because its failure to respond to the Union's comprehensive proposal and its refusal to negotiate on economic matters tainted even a valid decertification petition. (ALJD 15).

The General Counsel, the Respondent, and William Berlew have filed exceptions to the judge's decision with the Board. The Union filed cross-exceptions pursuant to Section 102.46(e) of the Board's Rules and Regulations, primarily excepting to the judge's failures to find additional reasons why the Company's withdrawal of recognition was unlawful and to the

judge's failures to order appropriate remedies. The Union files the present brief in support of those exceptions pursuant to Section 102.46(e).

III. QUESTIONS PRESENTED

1. Did the judge err in concluding that the Respondent's unlawful unilateral withholding of the customary annual wage increase on August 1, 2016, did not preclude the Respondent from withdrawing recognition of the Union on November 29, 2016? (Exception 1)

2. Did the judge err in concluding that the Respondent's unlawful unilateral discontinuation of its practice of offering light duty to injured employees on October 14, 2016, did not preclude the Respondent from withdrawing recognition of the Union on November 29, 2016? (Exception 2)

3. Did the judge err in concluding that the Respondent's multiple unlawful failures to provide to the Union requested information relevant to collective bargaining did not preclude the Respondent from withdrawing recognition of the Union on November 29, 2016? (Exceptions 3 and 4)

4. Should the judge have ordered the Respondent to make employees whole for losses caused by Respondent's unlawful unilateral withholding of its customary annual wage increase in August 2016? (Exception 5)

5. Should the judge have ordered the Respondent to make employees whole for losses caused by Respondent's unlawful unilateral discontinuation of its practice of offering light duty to injured employees where he specifically found that some employees may not have been made whole? (Exception 6)

6. Should the judge have ordered the Respondent to bargain with the Union for a minimum of 24 hours per month and to submit monthly reports on the progress of bargaining to

the Regional Director while simultaneously serving a copy of said reports on the Union? (Exception 7)

7. Should the judge have ordered a responsible official of the Respondent to read the Notice to Employees aloud to employees (or, at the Respondent's choice, a Board agent to do so in the presence of such an official)? (Exception 8)

8. Should the judge's bargaining order have conformed to the Board's standard language for such affirmative bargaining orders? (Exception 9)

9. Should the judge have granted the motions of the Charging Party and of the General Counsel to strike material attached to the Respondent's post-hearing brief that was not admitted into the record and to strike references thereto in the Respondent's post-hearing brief? (Exception 10)

IV. ARGUMENT

A. The Company's unlawful failure to give advance notice and an opportunity to bargain before failing to give employees an established annual wage increase precluded it from withdrawing recognition of the Union.

Employees were expecting a significant hourly wage increase at the beginning of August 2016. Past increases, given consistently on or about August 1, had ranged between $0.40 and $0.70 per hour. The Company frustrated these expectations when, without any notice to the Union in advance, it failed to increase pay rates on or about August 1, 2016. Employees found out about this when they received their first paychecks in August and noticed their wage rates had not changed. (ALJD 12). Judge Amchan correctly concluded that this unilateral change, without advance notice and an opportunity to bargain, violated Sections 8(a)(5) and (1) of the Act. (ALJD 13). The Union excepts to the judge's determination that this violation of the Act

did not preclude the Company from withdrawing recognition of the Union on November 29, 2016.

It is well-established that an employer may not withdraw recognition from a union where it has committed unfair labor practices that would predictably lead to employee disaffection. *E.g.*, *CoServ Elec.*, 366 NLRB No. 103, slip op. at 10 (2018); *Wire Products Mfg. Corp.*, 326 NLRB 625, 627 (1998), *enfd.* 210 F.3d 375 (7th Cir. 2000). If the Board finds a connection between the employer's unfair labor practices and subsequent expressions of employee disaffection, a withdrawal of recognition premised upon those tainted expressions is unlawful. *CoServ*, 366 NLRB No. 103, slip op. at 3. The Board does not probe the subjective states of mind of employees but instead applies an objective standard, asking what effect the specific unfair labor practices would likely have upon the employees. *AT Sys. W., Inc.*, 341 NLRB 57, 60 (2004); *see CoServ Electric*, 366 NLRB No. 103 at slip op. 3 n.10 (stating that employee testimony about their personal reasons for expressing disaffection from the union "is irrelevant" to determining whether the employer's unfair labor practices precluded its withdrawal of recognition); *Bunting Bearings Corp.*, 349 NLRB 1070, 1072 (2007); *St. Gobain Abrasives Inc.*, 342 NLRB 434, 434 n.2 (2004); *Wire Prods.*, 326 NLRB at 627 n.13.

In a case decided earlier this year, *CoServ Electric*, the Board found that an employer's unlawful unilateral failure to grant an established annual wage increase rendered its withdrawal of recognition of its employees' union unlawful. 366 NLRB No. 103, slip op. at 2-3. There, the employer failed to give its established annual wage increases without notice to the union. *Id.*, slip op. at 11. The union was in the midst of attempting to bargain a first contract. *Id.*, slip op. at 3, 7. Ten months after the employer failed to pay its annual wage increase, and while this unfair labor practice was still unremedied, employees signed a disaffection statement upon which the employer

relied to withdraw recognition from the union. *Id.*, slip op. at 3 & n.8. The Board concluded that the employer's withholding of the annual wage increase was connected to the disaffection statement, and it held that the employer had violated the Act by relying upon that statement to withdraw recognition. *Id.*, slip op. at 2-3. The Board reasoned:

> The Respondent's unilateral change to its past practice of increasing employees' wage ranges involved the important, bread-and-butter issue of employee earnings for which employees sought and gained union representation, and such a unilateral change, particularly where the Union was bargaining for a first contract, is likely to have a lasting effect on employees. The unilateral elimination of the annual practice of increasing employees' wage ranges substantially affected all, or nearly all, unit employees. Further, each time the employees received a paycheck without the customary annual raise, they were reminded of the Union's ineffectiveness in preserving such raises, let alone in obtaining additional wage increases. As the Board held in *Penn Tank Lines, Inc.*, 336 NLRB 1066, 1067 (2001), "the possibility of a detrimental or long-lasting effect on employee support for the union is clear" where the employer's unlawful unilateral conduct, like here, suggests to "employees that their union is irrelevant in preserving or increasing their wages."

Slip op. at 3 (footnote omitted); *see also Broadway Volkswagen*, 342 NLRB 1244, 1247 (2004), *enfd.* 483 F.3d 626 (9th Cir. 2006) (stating wages are an "important, bread-and-butter issu[e] . . . for which employees seek and gain union representation" and that, "particularly where the Union is bargaining for its first contract," unilateral changes to wages "can have a lasting effect on employees").

The instant case is controlled by *CoServ*. The Company's unilateral withholding of the annual pay increase on about August 1, 2016, without advance notice to the Union, tainted the subsequent expressions of employee disaffection and precluded the Company from ceasing to recognize the Union. Indeed, the nexus between employee disaffection and the unilateral failure to pay wage increases is even tighter in the present case, where the gap in time between the failure

to pay wage increases and employee signatures on the disaffection petition was only two or three months, instead of the ten-month gap seen in *CoServ*. Slip op. at 3 & n.8; (ALJD 3). The judge did not even attempt to distinguish *CoServ*, and his conclusion that the Respondent's unlawful withholding of established annual raises did not taint the subsequent disaffection petition was an error. (ALJD 13).

B. The Company's unlawful unilateral discontinuation of light duty work precluded it from withdrawing recognition of the Union.

In the ALJD, Judge Amchan found that the Company violated the Act by unilaterally discontinuing its established practice of providing light duty work to injured employees on October 14, 2016. (ALJD 13). However, the judge determined that this unfair labor practice did not preclude the Company from withdrawing recognition of the Union on November 29. (ALJD 13). This conclusion was an error.

The layoff of light-duty employees in October 2016 was the type of unilateral change that would predictably promote employee disaffection. Without prior notice to the Union, it resulted in the absence from the facility of over 10 percent of the workforce, including the Union's top leader in the unit. Less serious unilateral changes have supported findings that withdrawals of recognition were unlawfully tainted. *See Strategic Res., Inc.*, 364 NLRB No. 42, slip op. 24-25 (2016) (stating unilateral change in holiday pay as a "most serious violation that strikes at the heart of the Union's legitimate role as representative of employees. Under such circumstances, where a union is unlawfully deprived of the opportunity to represent the employees, it is altogether foreseeable that the employees will soon become disenchanted with that union, because it apparently can do nothing for them."); *Ardsley Bus Corp., Inc.*, 357 NLRB 1009, 1012 (2011) (unilateral change of failing to post of certain routes for school bus drivers); *Lexus of Concord, Inc.*, 330 NLRB 1409, 1416 (2000) (finding unilateral change in 401(k) proximate in time to

employee petition is likely to undermine employee support for the Union). The unilateral removal of the Union's President from work could only give workers the impression that the Union was powerless to protect their rights, jobs, and benefits.

The judge's rationale for concluding that this unfair labor practice did not taint the Respondent's withdrawal of recognition in November 29, 2016, is seriously flawed in two respects. Judge Amchan relied on the fact that the Company reinstated the affected employees on October 19 and also upon a message from the Union taking credit for their reinstatement sent to some unit employees on October 26. (ALJD 13).

First, although the Company reinstated employees on October 19, it did not repudiate its unlawful actions. *See Passavant Mem'l Area Hosp.*, 237 NLRB 138, 138-139 (1978). The Company did not fully compensate affected workers for their losses, (ALJD 13), and it never communicated to employees as required by *Passavant*. 237 NLRB at 138-139. It never published any repudiation of its actions to employees, and it gave no assurances that it would respect employees' rights going forward. The fact that the Union published a statement to some employees a week later does not substitute for the Company's complete failure to assure employees that it would not repeat its unlawful conduct.

Second, Judge Amchan's reliance on the Union's October 26 communication ignores the crucial fact that a substantial (and, indeed, determinative) number of apparent signatures on the disaffection petition are dated between October 14 and October 26, *i.e.*, during the period after the unlawful unilateral action but before the Union communicated its success in securing employees' return to light duty work. (Er. Ex. 2).[3] In fact, ten apparent signatures (a determinative number)

[3] Citations to the Respondent's exhibits will appear in the format "Er. Ex." followed by the number of the relevant exhibit.

were dated October 14, the day the unfair labor practice first occurred. (ALJD 13; Er. Ex. 2). And Byron Filipkowski, one of the individuals on light duty whom the Employer had kept out of the facility, signed the petition on October 20, the day after he was returned to work. (Tr. 64; Er. Ex. 2).[4] The Company's unfair labor practice remained unremedied at the apparent times of these signatures. The Company's unfair labor practice thus tainted these signatures, and they could not be relied upon to support a lawful withdrawal of recognition. *See CoServ*, 366 NLRB No. 103, slip op. at 3 (stating that because the employer's "unfair labor practices were unremedied during the time when the decertification petition was being circulated," they rendered the withdrawal of recognition unlawful, despite the fact that the unfair labor practices were subsequently remedied).

The judge's conclusion that this unfair labor practice did not taint the disaffection petition was therefore erroneous. The Company's failure to repudiate its unlawful acts, compensate all affected employees, and offer assurances that it would not repeat its actions meant that the unfair labor practice was unremedied during the time the disaffection petition was circulating. Even if one were to assume that the Union's October 26 message had some prospective remedial impact, the message did not travel back in time to remedy the Respondent's unfair labor practice at its inception. The result is that a determinative number of apparent signatures on the disaffection petition occurred during a period when the unfair labor practice was completely unremedied.

C. The Respondent's unlawful failure to provide information relevant to collective bargaining upon request also tainted its subsequent withdrawal of recognition.

Judge Amchan concluded that the Company refused to provide information requested by the Union in August and September 2016 that was relevant to the collective bargaining process

[4] Citations to the hearing transcript will appear as "Tr." followed by the relevant page.

in violation of the Act. (ALJD 15-17). However, the judge erroneously failed to find that the Company's unlawful failures to provide this relevant information precluded the Company from withdrawing recognition of the Union.

Just as with the Respondent's other unfair labor practices, the Company's repeated refusals to provide information relevant to collective bargaining prevented the Company from lawfully withdrawing recognition of the Union. Judge Amchan found that the information requests here, which, among other things, sought information about the Company's representations in bargaining regarding its financial state and competitive position, were sought for the purpose of bargaining over the annual 2016 wage increase. (ALJD 17). The Company's failure to provide this information impeded the bargaining process; in fact, no agreement on the 2016 annual wage increase was reached before the Company withdrew recognition of the Union. (ALJD 12). Where an employer's "unlawful refusal to supply information to the Union prevented [it] from accomplishing its intended objective . . . The natural and probable consequence" is "to convince employees that the Union was ineffective." *Tritac Corp.*, 286 NLRB 522, 538 (1987). In view of this, "[t]he Board has held that an employer's reasons for withdrawing recognition were invalidated by unfair labor practices, which included a refusal to furnish relevant information to the Union. *Id.* at 538-539, *citing Ace Mach. Co.*, 249 NLRB 623, 635, 638 (1980); *see also Strategic Res.*, 364 NLRB No. 42 slip op. at 25 (relying in part upon employer's failure to provide information necessary for bargaining as a factor in causing employee disaffection); *Ardsley Bus Corp.*, 357 NLRB at 1012 (identifying "repeated failures to provide the Union with presumptively relevant information necessary for its representational and bargaining obligations" as acts that "would tend to undermine the Union in the eyes of unit employees"); *Bridgestone/Firestone, Inc.*, 332 NLRB 575, 577 (2000), *enfd. in relevant part*, 47

Fed. Appx. 449 (9th Cir. 2002) ("By refusing to provide the requested information, the Respondent impeded the Union's ability to contact employees and to prepare for the upcoming negotiations. That conduct too thus reasonably tended to create the impression among employees that the Union was ineffectual.").

Judge Amchan found that the Respondent repeatedly refused to provide information useful to the Union in negotiations. (ALJD 16-17). The Union informed unit employees in at least eight communications between September 1, 2016, and November 17, 2016, that the Company was refusing to provide the Union with information necessary to bargaining. (G.C. Ex. 6).[5] The employees' knowledge of the Company's unfair labor practices increased the likelihood that they contributed to the decision to sign the disaffection petition. *Cf. Champion Enter., Inc.*, 350 NLB 788, 792 (2007) (relying upon the fact that "there was no evidence that the unit employees knew of [the employer's refusal to provide information to the union] at the time they signed the petition" to find that there was no causal connection with employee disaffection). Accordingly, the Board should reverse Judge Amchan and hold that the Respondent's withdrawal of recognition of the Union was unlawful not only for the reasons articulated in the ALJD, but also because of the Respondent's other violations of the Act.

D. The judge did not order that the Respondent make employees whole for losses caused by its unlawful withholding of its established annual wage increase, the standard remedy for such a violation.

It is unclear why the judge failed to order that the Company make employees whole for their losses attributable to the Company's unlawful failure to grant the established annual wage

[5] Citations to exhibits offered by the General Counsel appear as "G.C. Ex." followed by the appropriate exhibit number.

increase on or about August 1, 2016. The judge did not explain why the remedial order lacked such a requirement, but irrespective of the reason, the Board should correct this error.

An order to make affected employees whole is a standard component of the Board's complement of remedies for unlawful unilateral changes. "[I]t is well-established Board law that an employer must make restitution for benefits denied employees by an employer's unlawful unilateral acts." *John Zink Co.*, 196 NLRB 942, 942 (1972). "[T]he Board's standard remedy in Section 8(a)(5) cases involving unilateral changes resulting in losses to employees is to make whole any employee affected by the change." *Grand Rapids Press*, 325 NLRB 915, 916 (1998), *enfd.* 208 F.3d 214 (6th Cir. 2000). There is no rationale for deviating from the Board's ordinary practice in this case.

The Board has twice ordered a make-whole remedy under the exact circumstances found in the instant case. In *Mission Foods*, 350 NLRB 336 (2008), and *Hyatt Regency Memphis*, 296 NLRB 259 (1989), *enfd. in relevant part*, 939 F.2d 361 (6th Cir. 1991), the employers in question had established practices of granting wage increases at specific times of year. *Mission Foods*, 350 NLRB at 337; *Hyatt Regency Memphis*, 296 NLRB at 281-282. In both cases, the wage increases were subject to some employer discretion. *Mission Foods*, 350 NLRB at 337; *Hyatt Regency Memphis*, 296 NLRB at 281-282. The two employers unilaterally failed to grant the established increases without advance notice and an opportunity to bargain with the unions. *Mission Foods*, 350 NLRB at 337-338; *Hyatt Regency Memphis*, 296 NLRB at 284. In both cases, the Board ordered that unit employees be made whole for all losses suffered because of the employers' unlawful unilateral failures to grant the established increases without advance notice and an opportunity for their unions to bargain. *Mission Foods*, 350 NLRB at 339; *Hyatt Regency Memphis*, 296 NLRB at 265.

The Board should correct the judge's error and include the same order as part of the remedy in this case. Here, as in *Mission Foods* and *Hyatt Regency Memphis*, the calculation of the losses suffered by unit employees by reason of the Respondent's unlawful conduct should be left to the compliance stage of the proceeding.[6] *Mission Foods*, 350 NLRB at 338 n.7; *Hyatt Regency Memphis*, 296 NLRB at 259 n.2; *see also John Zink*, 196 NLRB at 942 ("Although some difficulty may be encountered in computing the employees' losses, this is not a legitimate reason for denying them all compensation. We are not required at this stage of the proceeding to decide either the detailed formula to be used in determining compensation due to the employees or the amounts so due. The formula to be used can be determined by agreement of the parties or, if necessary, in a backpay proceeding.").

E. The judge did not order that the Respondent make employees whole for losses caused by its unlawful unilateral discontinuation of light duty work, the standard remedy for such a violation.

The judge also failed to order the standard make-whole remedy for the Company's unlawful unilateral discontinuation of light duty work for unit employees. Judge Amchan found that the Company's actions violated Section 8(a)(5), and he specifically found that some employees affected by the unilateral change may not have been fully reimbursed for their losses. (ALJD 13). Despite this, he inexplicably failed to order the Respondent to make employees whole for losses resulting from its violation. This was an error, and the Board should order the Company to fully reimburse affected employees to achieve complete remediation of its unfair labor practice.

[6] The compliance stage of the proceeding is the appropriate time to consider whether the January 2017 wage increase of $0.15 per hour, retroactive to August 1, 2016, and granted after the Respondent withdrew recognition of the Union on November 29, should offset the Respondent's liability. *E.g.*, *R.P.C., Inc.*, 311 NLRB 232, 235 n.20 (1993).

F. The judge failed to order the Company to bargain for at least 24 hours per month and to submit written bargaining reports.

The General Counsel requested that the Company be ordered to bargain for at least 24 hours per month, to submit monthly reports on the progress of negotiations to the Regional Director, and to serve the reports upon the Union so that the Union could have an opportunity to reply. (G.C. Ex. 1(p)). Without explicitly considering the General Counsel's request, the judge did not include this measure in the remedial order. Because these requirements are necessary to re-establish the Union's status as bargaining representative and to promote meaningful bargaining, the judge's failure to order this minimum frequency of bargaining was an error.

When an employer's unlawful conduct unlawfully prevents a union from fulfilling its proper role as the representative of employees, the Board has ordered minimum frequencies of bargaining so as to rebuild the collective bargaining relationship destroyed by the employer's unlawful conduct. *See Thermico, Inc.*, 364 NLRB No. 135, slip op. at 3 n.4 (2016) (where employer never commenced bargaining after eleven months since union's initial bargaining demand, ordering the employer to bargain "not less than twice per week, at least 4 hours per session"); *All Seasons Climate Control, Inc.*, 357 NLRB 718, 718 n.2 (2011), *enfd.* 540 Fed. 484 (6th Cir. 2013) (where employer unlawfully withdrew recognition, Board ordered the employer to bargain "for a minimum of 15 hours per week and to submit progress reports every 30 days"). In such cases, the "bargaining schedule is warranted both to restore the Union's status as the employees' bargaining schedule and to promote regular, meaningful bargaining." *Thermico*, 364 NLRB No. 135, slip op. at 3 n.4.

Here, the Union has been unlawfully ousted from its status as employee representative for nearly two years, since November 29, 2016. The Company's extended and unlawful refusal to recognize the employees' representative has severed the collective bargaining relationship

between it and the Union. It is appropriate to rebuild the relationship by requiring the Respondent to bargain at least 24 hours per month. This is substantially less demanding than the bargaining schedules imposed in *All Seasons*, 357 NLRB at 718 n.2 (requiring a minimum of 60 hours of bargaining per month) and in *Thermico*, slip op. at 4 (requiring a minimum of 32 hours of bargaining per month).

It is particularly appropriate to impose a bargaining schedule in the instant case because the Respondent here was employing "dilatory tactics in contravention of its duty to bargain in good faith," even before its unlawful withdrawal of recognition. *UPS Supply Chain Solutions, Inc.*, 366 NLRB No. 111, slip op. at 4 (2018). In *UPS Supply Chain*, the employer's conduct during bargaining fell short of its obligation to bargain in good faith by imposing an unlawful condition on bargaining, refused to submit substantive counterproposals, and cancelled bargaining sessions. Slip op. at 4. The Board imposed a bargaining requirement of at least 24 hours per month. *Id.* The Board explained that because "the Respondent has employed dilatory tactics in contravention of its duty to bargain in good faith, we believe that a bargaining schedule requiring the Respondent to meet and bargain with the Union on a regular and timely basis is appropriate and would best effectuate the purposes of the Act." *Id.*; *see also Kitsap Tenant Support Serv., Inc.*, 366 NLRB No. 98, slip op. at 23 (2018) (requiring 15 hours per week of bargaining to remedy dilatory tactics including refusal to provide relevant information and overall bad faith bargaining); *Prof'l Transp., Inc.*, 362 NLRB No. 60, slip op. at 3 (2015) (imposing bargaining requirement of 24 hours per month where the employer engaged in dilatory tactics of cancelling bargaining sessions).

Here, during the fourteen months of bargaining prior to the Company's unlawful withdrawal of recognition, the Company engaged in dilatory tactics in dereliction of its duty to

bargain. Judge Amchan found that the Company refused to bargain over economic matters until agreement was reached on all noneconomic issues (ALJD 14); refused to respond to many elements of the Union's comprehensive initial proposal (ALJD 15); and (3) refused to provide information the Union requested for bargaining. (ALJD 16-17). The judge explicitly found that the Company's refusal to bargain over economic matters and its refusal to respond to the Union's proposals impeded the bargaining process and "dragg[ed] out negotiations. (ALJD 15). The Respondent's dilatory tactics mean that a bargaining schedule is appropriate to "promote regular meaningful bargaining between the parties." *UPS Supply Chain*, 366 NLRB No. 111, slip op. at 4.

In view of these precedents, it is apparent that the minimum bargaining requirement of 24 hours per month sought by the General Counsel is necessary both because the Respondent has unlawfully ruptured the bargaining relationship by withdrawing recognition from the Union for nearly two years without justification and because the Respondent had employed dilatory tactics during bargaining before withdrawing recognition.

G. The judge failed to order that the Notice to Employees be read aloud to employees.

The General Counsel also sought an order requiring that the Notice to Employees be read aloud to employees. The judge did not explicitly consider this request in his decision, and his order did not include a reading requirement. This was an error, as a notice reading is necessary to remedy the Respondent's multiple serious unfair labor practices.

The Board recently imposed a notice-reading requirement under after finding violations similar to, but less serious than, the unfair labor practices found here. In *CoServ Elec.*, 366 NLRB No. 103 (2018), the Board held that the employer's unlawful withdrawal of recognition, as well as its subsequent unilateral changes and refusals to provide requested information,

supported a notice reading.[7] *Id.*, slip op. at 1 n.3. The Board found that "[t]hese violations not only adversely impacted the entire unit but also undermined the confidence of unit employees in the Union's ability to represent their interests in bargaining." *Id.* It determined that a notice reading order was appropriate to redress this harm, stating "will dissipate any lingering effect of the Respondent's actions and enable employees to exercise their Sec. 7 rights free of coercion" and that "it will also assure employees that their employer understands the Board's order and is committed to complying with the Act in the future." *Id.* The Board noted that this remedy was "particularly important" because the employer "has acted so as to undermine employees' decisions regarding unionization." *Id.*

The circumstances found to justify a notice reading order in *CoServ* are also present in this case. The Company withdrew recognition of the Union on November 29, 2016, and has subsequently operated the business without any regard for the Union's rightful role as representative of the unit employees. The Respondent's conduct has thus "undermined the confidence of unit employees in the Union's ability to represent their interests in bargaining" and "undermine[d] employees' decisions regarding unionization. *Id.*

This case does not simply parallel *CoServ*; there are substantial additional reasons why a notice reading is appropriate in this case that did not form part of the rationale for the notice reading requirement there. Even before the Company unlawfully withdrew recognition of the Union, the Company committed unfair labor practices that struck at the core of the Union's status as bargaining representative. This included refusing to negotiate with the Union regarding

[7] Although the employer had also unilaterally failed to give employees an annual wage increase and made statements blaming the union for that change, the Board explicitly did not base its notice reading order upon those unfair labor practices because they were made outside the 10(b) period. *CoServ*, 366 NLRB No. 103, slip op. at 1 n.3.

many of the subjects most critical for a collective bargaining agreement (as well as a host of other subjects) (ALJD 14-15); failing to give an established annual wage increase without notifying the Union (ALJD 12-13); discontinuing its established light duty program without notifying the Union (ALJD 13); and refusing to provide information requested by the Union relevant for collective bargaining (ALJD 16-17). So even before its unlawful withdrawal of recognition, the Respondent had committed violations that "adversely impacted the entire unit" and "undermined the confidence of unit employees in the Union's ability to represent their interests in bargaining." *CoServ*, 366 NLRB No. 103, slip op. at 1 n.3. This matter therefore presents a substantially more compelling case for a notice-reading order than even *CoServ*. The judge's failure to order that the notice be read to the employees was thus an error.

H. The judge's affirmative bargaining order should be clarified to conform to the Board's standard language for such orders.

As part of the remedy for the Company's unlawful withdrawal of recognition of the Union, the judge properly ordered the Company to bargain with the Union. (ALJD 17). This is the traditional and appropriate remedy for an unlawful refusal to bargain with employees' lawful collective bargaining representative. *Community Health Servs., Inc.*, 342 NLRB 398, 398 (2004), *enfd.* 483 F.3d 683 (10th Cir. 2007); *Caterair Int'l*, 322 NLRB 64, 68 (1996). Because the Respondent unlawfully refused to recognize the Union as its employees' representative, the judge was right to order the Respondent to bargain with the Union.

However, the judge's bargaining order deviated from the Board's standard practice for such orders. In an affirmative bargaining order, the Board requires that the employer "[r]ecognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a

signed agreement. *E.g.*, *CoServ*, 366 NLRB No. 103, slip op. at 5. The full description of the unit is then set forth. *Id.*

Compliance with such order requires an employer to bargain with the union in good faith for a "reasonable period of time." *Caterair*, 322 NLRB at 68. During this reasonable period of good-faith bargaining, the union's majority status cannot be questioned. *Id.* at 67-68; *Lee Lumber & Building Material Corp.*, 334 NLRB 399, 399 (2001), *enfd.* 310 F.3d 209 (D.C. Cir. 2002). The "reasonable period of time" must always be at least six months, and it commences when the employer begins bargaining in good faith. *Id.* at 399 & n.6; *see also Veritas Health Servs., Inc.*, 363 NLRB No. 109, slip op. at 2 n.7 (2016), *enfd. in relevant part* 895 F.3d 69 (D.C. Cir. 2018). Beyond the six-month minimum period, the Board examines a set of five factors to determine the length of the "reasonable period of time," which cannot exceed one year. *Lee Lumber*, 334 NLRB at 402. These factors are:

> whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

*Id.*at 402.

The judge's bargaining order erroneously specified that the Respondent must bargain with the Union "for a period of not less than 6 months." (ALJD 17-18). Although the judge's discussion of the bargaining order indicates he understood the Respondent to be required to bargain with the Union for a "reasonable period of time," (ALJD 17), the language in his order could be misunderstood as an alteration of the Board's established requirement that an affirmative bargaining order requires a "reasonable period of time" of good-faith bargaining

before a union's status as representative could be subject to challenge. *See Lee Lumber*, 334 NLRB at 402. The judge's order also failed to follow the standard practice of including the detailed unit description. *E.g.*, *CoServ*, 366 NLRB No. 103, slip op. at 5.

Accordingly, the affirmative bargaining order should be modified to hew to the Board's standards for such orders. Specifically, the Union requests that the Board substitute the following language for Section 2(a) of the order, which adds a description of the certified unit and removes the non-standard durational language:

> Recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:
>
> > All full-time and regular part-time production and maintenance employees employed by the Employer at its 1141 Highway 315, Plains, PA facility, excluding all other employees, office clerical employees, audit inspectors, guards, and supervisors (including group leaders) as defined in the Act.

I. The judge should have granted the motions of the Union and the General Counsel to strike exhibits not admitted at the hearing and references thereto.

The Company attached materials to its post-hearing brief that were never admitted into the record at the hearing before Judge Amchan. Both the General Counsel and the Union filed motions to strike these materials from the record, as well as all references thereto in the Company's brief. The judge did not rule upon these motions, and the Union excepts to his failure to grant the motions to strike.

It is well-established that exhibits not entered into evidence are not part of the record. *See*, *e.g.*, *S. Mail, Inc.*, 345 NLRB 644, 644 n.2 (2005) (granting motion to strike portions of respondent's brief containing "references . . . to documents and testimony which were not admitted into evidence at the hearing and are not, therefore, part of the record in this

proceeding"); *Carbonex Coal Co.*, 248 NLRB 779, 784 n.1 (1980). Section 102.45(b) of the Board's Rules and Regulations sets forth a complete list of the various items that form the record:

> The charge upon which the complaint was issued and any amendments thereto, the complaint and any amendments thereto, notice of hearing, answer and any amendments thereto, motions, rulings, orders, the stenographic report of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the administrative law judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in §102.46, shall constitute the record in the case.

This list does not include documents attached to briefs.

The Board sensibly limits itself to considering evidence that has been made part of the record by an administrative law judge or which is otherwise a component of the record established by its Rules and Regulations. Consideration of documents attached to a brief but not admitted into evidence or otherwise part of the record "would deny the parties the opportunity for *voir dire* and cross-examination, and would violate the Board's rules." *Today's Man*, 263 NLRB 332, 333 (1982), *citing* Section 102.45(b) of the Board's Rules and Regulations (granting motion to strike exhibits not entered into evidence and references thereto in party's brief). The Board's ordinary course is to grant a motion to strike the documents and any references to them from the brief. *See Electro-Tec, Inc.*, 310 NLRB 131, 131 n.1 (1993) *enfd.* 993 F.2d 1547 (6th Cir. 1993) ("The General Counsel's motion to strike the Respondent's exhibit is granted, inasmuch as the exhibits consist of documents which were not admitted into evidence at the hearing and are not, therefore, part of the record in this proceeding."); *S. Freedman Electric, Inc.*, 256 NLRB 432, 432 n.1 (1981); *S. Florida Hotel & Motel Ass'n*, 245 NLRB 561, 561 n.6 (1979), *enfd. in part and denied in part on other grounds* 751 F.2d 1571 (11th Cir. 1985).

In the instant case, the Respondent attached three documents to its post-hearing brief that were not offered or admitted into evidence at the hearing and so "are not part of the record in this matter." *Ambrose Auto & Autotrans Katayenko*, 361 NLRB 931, 931 (2014). The Company attached "Exhibit A," which appears to be a letter dated March 1, 2017, from the Regional Director to Nathan Kilbert of the Union, and "Exhibit B," which appears to be letter a dated October 31, 2016, from Walsh to the Company's attorney Rick Grimaldi. The third attachment to the Respondent's brief was what Respondent claimed was Employer Exhibit 3, but which the Respondent admitted in its brief it had altered to add page numbers. *See* Respondent post-hearing brief, n.2. Because none of these documents were admitted into the record, the judge should properly have granted the motions to strike the attachments and references to them in the brief.

The Respondent has argued that Exhibits A and B should be considered pursuant to Rule 201 of the Federal Rules of Evidence ("FRE 201"). FRE 201 provides that courts may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[8] Exhibits A and B are not suitable for judicial notice because it cannot be said that they are "not subject to reasonable dispute." Respondent's brief relied upon Exhibit A to bolster its contentions about the Respondent and its relationship with the Union. (*See* Company's Post-Hearing Br. at 43 (nature of a quarterly bonus paid by Respondent to unit employees); 45 (Union's bargaining positions on employee contributions to health insurance premiums for the

[8] A court may also notice a fact that is not subject to reasonable dispute because it "is generally known within the trial court's territorial jurisdiction." FRE 201. This prong of the rule is plainly inapplicable here.

2016 plan year); 51 (same); and 53 n.19 (parties' use of ground rules)).[9] FRE 201 requires a "high degree of indisputability" to be subject to judicial notice. Advisory Committee's Note, FRE 201. In stark contrast to the Respondent's purported facts, the Board properly takes judicial notice of facts that are genuinely not subject to reasonable dispute. *See Metro-West Ambulance Servs.*, 360 NLRB 1029, 1055 & n.48 (2014) (judicial notice taken of rainfall as reported by the National Weather Service); *Bud Antle, Inc.*, 359 NLRB 1257 n.3 (2013), incorporated by reference, 361 NLRB 873 (2014) (judicial notice taken of geographic distance as shown by Google Maps).

Judicial notice is also inappropriate because a letter from a Regional Director setting forth his findings is not a suitable source for judicial notice of facts about the Respondent and its relationship with the Union. Such letters are not "sources whose accuracy cannot reasonably be questioned." FRE 201. Indeed, "courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 n.6 (7th Cir. 1997). Accordingly, judicial notice of these attachments was improper, and the judge should have granted the motions to strike.

[9] To the extent that the Company sought judicial notice that certain allegations were withdrawn or dismissed, those facts, too, were actually subject to dispute, as made clear in the "General Counsel's Opposition to Respondent's Motion to Strike Paragraphs 7, 8, and 10 in the Amended Complaint," filed April 23, 2018. That Opposition made clear that the General Counsel strongly disputed the Respondent's position regarding which charge allegations remained pending. Thus, even these procedural facts lack the requisite degree of indisputability for judicial notice.

V. CONCLUSION

For the reasons stated above, the Charging Party respectfully requests that the Board correct Judge Amchan's decision in the manner specified in the Charging Party's exceptions.

Respectfully submitted,

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UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

CERTIFICATE OF SERVICE

This is to certify that a true copy of the Charging Party's Brief in Support of Cross-Exceptions to the Decision and Recommended Order of the Administrative Law Judge was served via electronic mail this 26th day of October, 2018, upon

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